

## Message Text

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ORIGIN L-02

INFO OCT-01 ARA-06 NEA-06 IO-10 ISO-00 FRB-01 OMB-01

TAR-01 SP-02 SWF-01 AGR-05 AID-05 CIAE-00 COME-00

EB-04 INR-05 LAB-01 NSAE-00 OIC-02 RSC-01 SIL-01

STR-01 TRSE-00 CIEP-01 CEA-01 FEA-01 INT-05 H-01 /065 R

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FM SECSTATE WASHDC

TO AMEMBASSY NEW DELHI

INFO USMISSION USUN NEW YORK

USMISSION GENEVA

AMEMBASSY MEXICO

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E.O. 11652: N/A

TAGS: UNCTAD, EGEN

SUBJ: CHARTER OF ECONOMIC RIGHTS AND DUTIES: EXCHANGE  
WITH INDIA

REFS: (A) STATE 242731 (B) NEW DELHI 15093

1. SUMMARY: LEGAL ADVISER OF GOI FONOFF, AFTER DETAILED  
DISCUSSION WITH DEPT DEPUTY LEGAL ADVISER, AGREED TO  
SEEK COMPROMISE FORMULATIONS ON PROPOSED CERDS TREATMENT  
OF FOREIGN INVESTMENT. END SUMMARY.

2. JAGOTA, LEGAL ADVISER GOI FONOFF, AND DEPUTY LEGAL  
ADVISER SCHWEBEL HAD EXTENDED EXCHANGE OVER LATEST  
GROUP OF 77 DRAFT CERDS PROVISIONS ON NATIONALIZATION  
AND MNCS. SCHWEBEL NOTED THAT THEY ARE AS EXTREME A  
RENDERING AS HAS EMERGED IN COURSE OF NEGOTIATIONS.  
USG IS ACCORDINGLY DISAPPOINTED WITH THEM AND THEIR  
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EMERGENCE AT THIS LATE STAGE AND, IF THEY WERE TO BE

PRESSED TO A VOTE, USG WOULD BE OBLIGED TO VOTE AGAINST THEM AND CHARTER AS A WHOLE. HE EXPRESSED HOPE THAT INDIA, WHOSE RECORD RESPECTING NATIONALIZATION IS EXCELLENT, WOULD USE ITS INFLUENCE TO PRODUCE A VIABLE COM-PROMISE FORMULA.

3. CERDS DRAFT OF ARTICLE 2 PROVIDES:

"1. EVERY STATE HAS AND SHALL FREELY EXERCISE FULL PERMANENT SOVEREIGNTY, INCLUDING POSSESSION, USE AND DISPOSAL, OVER ALL ITS WEALTH, NATURAL RESOURCES AND ECONOMIC ACTIVITIES.

"2. EACH STATE HAS THE RIGHT:

A) TO REGULATE AND EXERCISE AUTHORITY OVER FOREIGN INVESTMENT WITHIN ITS NATIONAL JURISDICTION IN ACCORDANCE WITH ITS LAWS AND REGULATIONS AND IN CONFORMITY WITH ITS NATIONAL OBJECTIVES AND PRIORITIES. NO STATE WHOSE NATIONALS INVEST IN A FOREIGN COUNTRY SHALL DEMAND PRIVILEGED TREATMENT FOR SUCH INVESTORS;

B) TO REGULATE AND SUPERVISE THE ACTIVITIES OF TRANS-NATIONAL CORPORATIONS WITHIN ITS NATIONAL JURISDICTION AND TAKE MEASURES TO ENSURE THAT SUCH ACTIVITIES COMPLY WITH ITS LAWS, RULES AND REGULATIONS AND CONFORM WITH ITS ECONOMIC AND SOCIAL POLICIES. TRANSNATIONAL CORPORATIONS SHALL NOT INTERVENE IN THE INTERNAL AFFAIRS OF A HOST STATE. EVERY STATE SHOULD, WITH FULL REGARD FOR ITS SOVEREIGN RIGHTS, CO-OPERATE WITH OTHER STATES IN THE EXERCISE OF THE RIGHT SET FORTH IN THIS SUB-PARAGRAPH;

C) TO NATIONALIZE, EXPROPRIATE, REQUISITION OR TRANSFER OWNERSHIP OF FOREIGN PROPERTY IN WHICH CASE APPROPRIATE COMPENSATION SHOULD BE PAID BY THE STATE TAKING SUCH MEASURES, PROVIDED THAT ALL RELEVANT CIRCUMSTANCES CALL FOR IT. IN ANY CASE WHERE THE QUESTION OF COMPENSATION GIVES RISE TO A CONTROVERSY, IT SHALL BE SETTLED UNDER THE DOMESTIC LAW OF THE NATIONALIZING STATE AND BY ITS TRIBUNALS, UNLESS IT IS FREELY AND MUTUALLY AGREED BY LIMITED OFFICIAL USE

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THE STATES CONCERNED THAT OTHER PEACEFUL MEANS BE SOUGHT ON THE BASIS OF THE SOVEREIGN EQUALITY OF STATES AND IN ACCORDANCE WITH THE PRINCIPLE OF FREE CHOICE OF MEANS."

4. RE SUBPARA 1 SCHWEBEL STATED THAT ONE COULD NOT REASONABLY SPEAK OF "PERMANENT" SOVEREIGNTY OVER ALL WEALTH. RE SUBPARA 2(A), SECOND SENTENCE IS OBJECTION-ABLE SINCE IT IS SUBJECT TO INTERPRETATION THAT A STATE

CANNOT MAKE DIPLOMATIC REPRESENTATIONS ON BEHALF OF ITS INVESTORS. 2(B) WOULD BE ACCEPTABLE IF IT WERE PLACED IN CONTEXT OF THE DUTY OF STATES TO FULFIL THEIR INTERNATIONAL OBLIGATIONS. 2(C) SPEAKS OF TRANSFER OF OWNERSHIP, APPARENTLY NOT NECESSARILY TO THE NATIONALIZING STATE. PROVISION THAT "APPROPRIATE" COMPENSATION "SHOULD BE PAID...PROVIDED" ETC. IS DERISORY, AND WORSENED BY THE EXCLUSIVE REFERENCE TO DOMESTIC LAW.

5. JAGOTA EXPLAINED MOTIVATIONS FOR PROPOSED BROADENED VERSION OF "PERMANENT SOVEREIGNTY". HE DENIED THAT INTENT OF SENTENCE ON PRIVILEGED TREATMENT IS TO DEBAR DIPLOMATIC REPRESENTATIONS. HE THOUGHT 2(B) COULD CONTAIN A REF TO INTERNATIONAL OBLIGATIONS. JAGOTA DEFENDED 2(C), MAINTAINING ITS EXCLUDES PAYMENT OF NO COMPENSATION AND, IN ITS SECOND SENTENCE, EXPRESSES LOCAL REMEDIES RULE.

6. UPSHOT WAS THAT JAGOTA (A) PRESSED USG TO OVERLOOK ITS "LOGICAL" OBJECTIONS TO SUBPARA 1. (B) AGREED SECOND SENTENCE PARA 2(A) SHOULD BE AMENDED THOUGH NOT DELETED. SCHWEBEL PROPOSED IT READ: "WITHOUT PREJUDICE TO THE RIGHT OF A STATE TO MAKE DIPLOMATIC REPRESENTATIONS IN SUPPORT OF ITS NATIONALS BEING TREATED IN ACCORDANCE WITH THE MINIMUM STANDARDS OF INT'L LAW, NO STATE WHOSE NATIONALS INVEST IN A FOREIGN COUNTRY SHALL DEMAND PRIVILEGED TREATMENT FOR SUCH INVESTORS WHICH HAS NOT BEEN AGREED TO BY THE HOST STATE." JAGOTA THOUGHT SUBSTANCE OF THIS PROPOSAL TO BE SATISFACTORY, BUT WORDING DELICATE. (C) JAGOTA FURTHER AGREED THAT, TO MEET USG CONCERN ON SUBPARA 2(B), REFERENCE TO "INTERNATIONAL OBLIGATIONS" SHOULD BE ADDED. SCHWEBEL COUNTERED THAT INTERNATIONAL OBLIGATIONS MUST COVER WHOLE TEXT, AND SUGGESTED NEW SUBPARA 2(D): "IN THE LIMITED OFFICIAL USE

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EXERCISE OF THE FOREGOING RIGHTS, STATES SHALL FULFIL IN GOOD FAITH THEIR INTERNATIONAL OBLIGATIONS". JAGOTA SPECIFIED "INTERNATIONAL OBLIGATIONS FREELY ENTERED INTO," BUT SEEMED PREPARED TO DROP THIS SPECIFICATION WHEN SCHWEBEL POINTED OUT THAT ITS ADDITION WOULD INADMISSIBLY EXCLUDE CUSTOMARY INTERNATIONAL LAW. (D) RE 2(C), JAGOTA AGREED TO SUPPORT INSERTION OF PHRASE "FOR A PUBLIC PURPOSE" AFTER "FOREIGN PROPERTY", AND TO RECONSIDER WHETHER BRILLANTES FORMULA IS VIABLE: "JUST COMPENSATION IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES SHALL BE PAID." HE SUGGESTED THAT "APPROPRIATE" BE SUBSTITUTED FOR "JUST" AND "SHOULD" FOR "SHALL", WHICH SUGGESTIONS SCHWEBEL INDICATED WERE NOT ACCEPTABLE. (E) JAGOTA FURTHER AGREED THAT HE WOULD SUPPORT AMENDMENT OF FIRST PHRASE OF LAST SENTENCE OF SUBPARA (C) TO

SPECIFY RULE OF EXHAUSTION OF LOCAL REMEDIES.

7. SCHWEBEL, IN THANKING JAGOTA FOR HIS CONSTRUCTIVE APPROACH, AGREED WITH JAGOTA'S ESTIMATE THAT, IF THIS WERE A BILATERAL NEGOTIATION, GOI AND USG COULD SETTLE OUTSTANDING PROBLEMS. JAGOTA SAID HE WOULD CONVEY REPORT OF FOREGOING TO HIS UN MISSION. HE NOTED HE WAS ABOUT TO RETURN TO DELHI AND COULD NOT TAKE PART IN RENEWED NY NEGOTIATIONS ON CERDS.

8. COMMENT: IF GOI APPROACH WERE TO BE CHANGED TO REFLECT POINTS OF PARA 6 OF THIS MESSAGE, POSITIVE IMPACT ON COURSE OF CERDS NEGOTIATIONS COULD BE SUBSTANTIAL. HOWEVER, THERE WAS EQUIVOCATION IN THE TONE AND TERMS OF JAGOTA'S STATEMENTS WHICH LEADS US NOT TO EXPECT TOO MUCH. END COMMENT. INGERSOLL

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